

No. 15921

United States
Court of Appeals
FOR THE NINTH CIRCUIT

HYACINTH FLICKINGER,

Appellant,

vs.

DONALD McGAVICK, Trustee in Bankruptcy of the
Estate of Hyacinth Flickinger,

Appellee.

Brief of Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

DONALD H. MCGAVICK
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**STATEMENT OF THE PLEADINGS AND FACTS DIS-
CLOSING THE BASIS UPON WHICH THE DISTRICT
COURT HAD JURISDICTION AND THE COURT OF
APPEALS HAS JURISDICTION TO REVIEW THE
ORDER AUTHORIZING THE SALE OF THE REAL
PROPERTY OF THE BANKRUPT.**

Jurisdiction of Court of Appeals, Ninth Circuit

The bankrupt, the appellant herein, voluntarily petitioned the United States District Court for the Western District of Washington for an adjudication of bankruptcy on the 14th day of May, 1957, pursuant to 11 U. S. C. A., Sec. 11, and was adjudicated bankrupt on the 15th day of May, 1957, by the said district court.

The statutory requirements of domicile were alleged and proven. The trustee, the appellee herein, was appointed on the 4th day of June, 1957, and qualified by giving the required bond.

On the 19th day of August, 1957, the trustee petitioned the referee in bankruptcy for an order authorizing the sale of the property of the bankrupt. Said petition was opposed by the bankrupt. On the 25th day of September, 1957, the referee in bankruptcy entered an order authorizing such sale. (Transcript of Record, Page 28.) On the 3rd day of October, 1957, the bankrupt filed a petition for review by the district court of said order entered by the referee. (Transcript of Record, page 24.) The said matter was argued before the district judge, Honorable George H. Boldt, and the order was entered on the 13th day of December, 1957. (Transcript of Record, Page 11.)

On the 23rd day of December, 1957, a motion by the bankrupt was made for reconsideration of the said court's decision, and the said motion was denied and an order to that effect filed on the 2nd day of January, 1958. (Transcript of Record, Page 16.)

Pursuant to 11 U. S. C. A., Sec. 48, the bankrupt served and filed notice of appeal (Transcript of Record, Page 17) on the 24th day of January, 1958, and paid into the registry of the court the sum of \$250.00 as and for an appeal bond. The transcript of record was subsequently received by the appellant and the appellee and, pursuant to Rule 18, Sec. 1, of the United States Court of Appeals for the Ninth Circuit, the appellant served and filed, within thirty days from receipt of such transcript of record, her brief.

Therefore, this matter is properly before the Ninth Circuit Court of Appeals at this time.

ARGUMENT

Fredrick F. Flickinger, the husband of the bankrupt herein, died November 5, 1956. Probate of the estate, which was all community property, was commenced on December 4, 1956, in the Superior Court of Pierce County, State of Washington. Appraisers were appointed to appraise the said estate as to its value at the time of the decedent's death. The said appraisers found the value of the estate to be approximately \$11,900.00, and, upon the petition of the surviving spouse, the bankrupt herein, pursuant to the laws of the State of Washington, the property was awarded

to her in lieu of homestead by order of the probate court on March 26, 1957, and the probate estate closed.

Subsequently to said award in lieu of homestead and prior to the filing of the petition for bankruptcy, the bankrupt executed a declaration of homestead claiming her interest in the home to be of a value not exceeding \$4,800.00. On the 14th day of May, 1957, the appellant filed her petition in bankruptcy and was adjudicated bankrupt on the 15th day of May, 1957. Thereafter the appellee was appointed trustee and qualified. The referee in bankruptcy appointed a competent appraiser and said appraiser submitted an appraisal of the real estate of the bankrupt showing a value of \$15,000.00, which property was subject to a mortgage of \$5,200.00, and a declaration of homestead of \$4,800.00 as declared by the bankrupt, leaving a net balance for the benefit of creditors in the amount of \$5,000.00.

It is the appellant's position that the value of the bankrupt's estate is res judicata insofar as the bankruptcy court and trustee are concerned, in that the value as found by the state court is binding on the bankruptcy court.

It is the appellee's position that the appraisal made in the probate of the estate of Fredrick F. Flickinger is in no way controlling on the bankruptcy court.

A BANKRUPT, UPON PETITIONING THE DISTRICT COURT FOR ADJUDICATION OF BANKRUPTCY, SUBMITS ALL OF THE PETITIONER'S PROPERTY TO THE JURISDICTION OF THE BANKRUPTCY COURT.

Jurisdiction of Bankruptcy Court

At the time the appellant submitted her petition in the bankruptcy court, the court obtained jurisdiction over all the assets and the trustee was vested with title to all property except that which is found to be exempt, and the bankruptcy court was empowered to order the sale of the property for the benefit of creditors, determine exemptions and decide all controversies relating thereto.

In 11 U. S. C. A., Sec. 110, *Title to Property*:

“(a) The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located . . . (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered . . .

“(c) . . . The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed

vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists.”

In the case of *In re Miller*, 95 F (2d) 441, the Court held on page 442, that:

“The bankruptcy court has jurisdiction and power to sell property of a bankrupt estate free from incumbrances . . . *Van Huffel vs. Harkelrode*, 76 L. Ed. 256, 78 A. L. R. 453. Whether it should take jurisdiction of incumbered property, however, is within the sound discretion of the court. *Federal Land Bank of Baltimore vs. Kuntz*, 4 Cir., 70 F (2d) 46. Ordinarily, the power to sell free of liens . . . should not be exercised unless there is some equity for the general creditors or some other benefit likely to inure to the estate.’ ”

And on page 443, the Court said:

“The court of bankruptcy, . . . as a court of equity, had full power and authority to follow substantially the procedure provided by the statutes of Illinois by directing a sale and ordering the exemption satisfied therefrom.”

In the case of *City & County of Denver vs. Warner*, 169 F (2d) 508 (Tenth Cir., 1948), at page 510, the Court stated that:

“Upon adjudication in bankruptcy all of the property of the bankrupt, both real and personal, wherever located is drawn to the jurisdiction of the Bankruptcy Court. *Fish vs. East*, 10 Cir., 114 F (2d) 177, 192. The trustee succeeds to the title of all the bankrupt’s property or his rights therein, as of the date of the filing of the petition in bankruptcy. See Section 70, sub. a of the Bankruptcy

Act, 52 Stat. 879, 11 U. S. C. A. Sec. 110, sub. 2; *Collier on Bankruptcy*, 14th Ed., Vol. 4, Section 70.04, p. 943. And, the Bankruptcy Court becomes vested with exclusive jurisdiction of all the property in either the actual or constructive possession of the bankrupt. *Mueller vs. Nugent*, 184 U. S. 1, 22 S. Ct. 269, 46 L. Ed. 405 It is authorized to collect the property, reduce it to money, distribute it, and determine controversies in relation thereto. See Section 2, sub. a. (7) of the Act, 52 Stat. 842, 11 U. S. C. A., Section 11, sub. a (7). To that end, it may make such orders, issue such process and enter such judgments in addition to those specifically provided for, as may be necessary to enforce the provisions of the Act. Section 2, sub. a (15)."

This case was later cited in *Inter-State National Bank of Kansas City vs. Luther*, 221 F (2d) 382, (10th Cir., 1955). At page 389 it was held that: •

" . . . The rule generally applicable in bankruptcy to the effect that once jurisdiction of a bankruptcy court has been invoked, whether by the debtor or the creditor, the petitioner risks 'all of the disadvantages which may flow to him as a consequence as well as gaining all of the benefits.' *Case vs. Los Angeles Lumber*, 308 U. S. 106, 60 S. Ct. 1, 12, 84 L. Ed. 110

"The bankruptcy court has exclusive and summary jurisdiction to allow or disallow claims against bankrupt estates. Bankruptcy Act. Sec. 2, sub. 2. In the exercise of that jurisdiction, it 'sits as a court of equity' clothed with jurisdiction 'to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankrupt estate'. *Pepper vs. Litton*, 308 U. S. 295, 60 S. Ct. 238, 246, 84 L. Ed. 281."

Probate of Estate Closed

The appellant relies strongly on *In re Naslund*, 6 Fed. Supp. 109, for the proposition that, once the state court obtained jurisdiction to determine the value of the homestead exemption, the bankruptcy court was bound by that determination, but failed to distinguish the facts in that case from those of the instant case. In the *Naslund* case the estate was still being administered by the probate court of the Superior Court of the State of Washington. The jurisdiction of the probate court attached prior to the filing of the bankruptcy and was still in existence at the time of filing the petition in the bankruptcy court. It is a well-established rule of law that once a court obtains jurisdiction it retains it until the matter before it is completed. *In re Naslund*, supra. The court held in the *Naslund* case that, inasmuch as the state court acquired jurisdiction in the administration of the estate, it would retain jurisdiction until disposed of in the manner provided by law. In the case now before the court the probate of the estate was closed for some time prior to the appellant invoking the jurisdiction of the bankruptcy court.

The value of the estate as fixed by the probate court was determined as of the date of death of the decedent. The value fixed by the court in bankruptcy was determined as of the date of filing the petition in bankruptcy. The value at the time of the adjudication of bankruptcy is the controlling factor in this case. It is noteworthy that there has been no allegation or proof

submitted by the appellant that the value of the property is less than as stated by the appraiser appointed by the referee in bankruptcy. The length of time between the closing of the probate proceedings and the subsequent filing of the petition in bankruptcy, whether it be one month, six months or ten years, would have no bearing as to the right of the bankruptcy court to determine the value of the bankrupt's estate or the proper exemption to be awarded to the bankrupt.

Exemptions

Under the provisions of 11 U. S. C. A., Sec. 11, *supra*, and 11 U. S. C. A., Sec. 24, "*Exemptions*":

"The provisions of this title should not affect the allowance to bankrupts and the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months, or the greater portion thereof, immediately preceding the filing of the petition."

The bankruptcy court, acting through the referee has the right to determine the validity of exemptions claimed. *In re Gordon's Estate*, 44 F (2d) 810.

The bankruptcy court has power to order sale of exempt property where its value exceeds the exemption allowable and the property is indivisible. It is stated in *Collier on Bankruptcy*, 14th edition, Vol. 1, page 803, under Section 6.05:

"A court of bankruptcy has jurisdiction to determine the merits of the bankrupt's claim to

exemptions but, as a rule, has no jurisdiction over the property claimed except to set it aside for his use and cannot order its sale, except where the exempt and non-exempt property are indivisible. This jurisdiction, so far as it goes, is *exclusive*, and the decision of the bankruptcy court as to the right of exemption, unless absolutely void, cannot be questioned in a collateral proceeding.”

In *Collier on Bankruptcy*, supra, Sec. 6.20, page 881—Sale by Trustee; Exemption out of Proceeds. Where Property is Inseparable, it is said:

“While, as a rule, the trustee has no power to sell the bankrupt’s exempt property, he may be authorized to sell it where it is inseparable from other property, not exempt, and exemptions will be allowed out of the proceeds.”

Cites *Bank of Nez Perce vs. Pindel* (CCA, 9th Cir.) 193 Fed. 917.

The Bankruptcy Court has exclusive jurisdiction to determine the validity and amount of claims and exemptions for and against the bankrupt. It is stated in *Collier on Bankruptcy*, supra, Sec. 6.23, page 889. Proof Required for Allowance of Exemptions:

“The bankrupt should show by a preponderance of proof that he is entitled to the exemption where there is an issue as to whether the exemption is allowable. The burden of proof rests upon the claimant of the exemption; he must bring himself and his property clearly within the statute relied upon.

“The bankrupt is not entitled . . . to a trial by jury of the issues raised by objections, and the referee’s findings of fact will not be disturbed unless clearly erroneous.”

In *Hancock Mutual Life Ins. Co. vs. Wagner*, 174 Wash. 185 (1933) on page 188, the Court states:

“The purpose of setting forth the value of the premises is to give notice to the world whether or not the value was within the statutory limit, and, if not, the excess above such limit Moreover, the estimate of value made by a homestead declarant is not conclusive either upon the declarant, the court, or any interested party. *Nelson vs. McKeen*, 165 Wash. 274.”

Summation

Prior to the time of filing the petition in bankruptcy, none of the estate of the bankrupt was subject to the jurisdiction of any court. Upon the filing of the said petition in bankruptcy the appellant submitted all of her property to the said court and the court then had exclusive jurisdiction to determine the value thereof and to allow any exemptions that the bankrupt may be entitled to under the laws of the State of Washington. This the trustee has endeavored to do.

The bankruptcy act was enacted for the purpose of shielding debtors from creditors under certain given circumstances. However, it was never intended to be a means by which a debtor could evade legal obligations while having more than adequate funds and assets with which to pay creditors.

The district court's judgment should be affirmed.

Respectfully submitted,

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No. 15921

In the
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

IN THE MATTER OF
HYACINTH M. FLICKINGER, Bankrupt,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

Appellant's Reply Brief

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1. On Page 3 of Appellee's Brief it is recited that "said appraiser submitted an appraisal of the real estate of the bankrupt showing a value of \$15,000.00, which property was subject to a mortgage of \$5,200.00, * * * ". The truth of the matter is that the appraiser appointed by the Trustee made a return reciting "he believed he could sell the homestead for \$15,000.00". (Transcript page 37)

2. On Page 4 of Appellee's Brief in quoting from 11 U. S. C. A., Sec. 110 (c), the Appellee appears to claim and the District Judge decided that any creditor "could have obtained a lien" on this homestead. In order to do that it would have been necessary for the alleged creditor to have contested the homestead claim of the bankrupt in the Superior Court for Pierce County under the provisions of R.C.W. 6.12.090, which was not done. And Appellant contends that there is no other way that any creditor could have obtained a lien against Appellant's homestead. To do so would be to wipe out the plain provisions of said state statute.

In the probate case the Superior Court declared this identical property free and clear of all claim which have or could have been filed in the probate case (Tr. of record, Page 5) and all claims listed or filed in the Bankruptcy Proceedings were pre-existing claims prior to the death of Frederick F. Flickinger (Tr. of record, Page 9) and there were no mechanics or other liens (Tr. of record, Page 9).

3. On Page 5 of Appellee's Brief there is a quotation from *In re Miller* at page 443 to the effect that

the Bankruptcy Court “had full power and authority to follow substantially the procedure provided by the statutes of Illinois by directing a sale and ordering the exemption satisfied * * * ”. All we are doing in this appeal is trying to get the Bankruptcy Court to “follow substantially the procedure provided by the statutes” of the State of Washington.

4. On the last paragraph of Appellee’s Brief on Page 7 the statement that the value of the estate in probate was determined as of the date of death of the decedent, is erroneous. See *in re Small’s Estate*, 27 W.2d. 680 where the Washington Supreme Court said:

“The value of the property should have been computed as of the time the Petition was filed for setting aside property to the surviving spouse in lieu of homestead, which was the date the surviving spouse first asserted her claim.”

(Citing an Illinois case, 82 N.E. 888)

5. On Page 8 of Appellee’s Brief it is recited that the length of time between the closing of probate and filing bankruptcy Petition “would have no bearing as to the right of the Bankruptcy Court to determine the value of the bankrupt’s estate or the property exemption to be awarded to the bankrupt.” We doubt that statement particularly with reference to the exemption. The motive for the statement appears to be the same as in the previous item noticed herein the effort to wipe out the effect of the provisions of R.C.W. 6.12.090.

6. At the bottom of paragraph 8 the quote “validity of exemptions claimed” and in the last line

“the merits of the bankrupt’s claim to exemptions” seem to be confused. The language of the bankruptcy law is: “Determine all claims of bankrupts to their exemptions,” Sec. 2a (11); the text in Collier’s Bankruptcy Manual, Sec. 6.01 recites:

“A court of bankruptcy has jurisdiction to determine the merits of the bankrupt’s claim to exemptions but, as a rule, has no jurisdiction over the property claimed except to set it aside for his use and cannot order its sale, except where the exempt and non-exempt property are indivisible.”

“As soon as the right of the bankrupt to the exemption claimed is determined, however, the court’s jurisdiction over the exempt property ceases and the court has no further control over it.”

“The rule is now well settled that the Bankruptcy Court has no jurisdiction to enforce a lien or claim upon exempt property and that such matters must be litigated, usually in the state courts.”

We contend that there is no proof nor claim of any kind in this whole case that there is a non-exempt property for two reasons—one that R.C.W. 6.12.090 has not been complied with and that there has been no real appraisal in bankruptcy of the exempt property.

7. At the top of Page 10 of Appellee’s Brief it is recited in the quotation from the Wagner case in Washington that the estimated value by the declarant is not conclusive. We admit that; but the contest on it can be carried on only pursuant to the provisions of R.C.W. 6.12.090; and in said statute it is recited

that the value is "presumed to be valid" until contested as therein provided for BY A COURT OF GENERAL JURISDICTION and finally in the summation the Appellee recites that the trustee has endeavored to "allow any exemptions that the bankrupt may be entitled to under the laws of the State of Washington." If he has so endeavored it is by ignoring and eclipsing entirely the provisions of R.C.W. 6.-12.090.

8. It is to be noted that the Appellee has not in any way except inferentially and erroneously contested any of the statements in the Appellant's Brief and we submit that he could not do so successfully. We invite the Court of Appeals to reverse the decision of the District Judge and of the Referee and to relegate the real claimant to his remedies in the Superior Court under the laws of the State of Washington, and that the Order of the Superior Court declaring this property exempt is Res Judicata.

Respectfully Submitted,

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